RECEIVED

OCT 14 1980

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5554

Josefina Herrera , Appellant

v.

Juan Hernandez , Appellee

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Appellant, Josefina Herrera, asks leave to file the attached Statement as to Jurisdiction on appeal from the Court of Civil Appeals of Texas without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Appellant's affidavit in support of this motion is attached hereto.

Richard D. Hatch
Counsel for Appellant

PO Box 1206
AransasPassTexas 78336
AC512 364 1503

RECEIVED
OCT 14 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5554

Josefina Herrera, Appellant

v.

Juan Hernandez, Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS

OF TEXAS

JURISDICTIONAL STATEMENT

October 10, 1980

Richard D. Hatch

Counsel for Appellant

PO Box 1206, Aransas Pass
Texas 78336
AC512 364 1503

INDEX

Page

Opinions below 1

Jurisdiction 2

Question presented 2

Constitutional provisions and Statutes ..... 2 & 3

Raising the federal question 3

Statement of the case ..... 3 & 4

The question is substantial ..... 4 & 5

Conclusion 5

Appendix 6

CITATIONS

Cases:

Levy v. Louisiana, 391 U.S. 68 (1968) 4

Weber v. Aetna Casualty & Surety, 406 U.S. .....
164 (1972) 4

Constitutional Provisions:

Fourteenth Amendment, United States Constitution 2

Statutes:

Texas Family Code §13.01 (Vernon 1975) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

Josefina Herrera, Appellant

v.

Juan Hernandez, Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

JURISDICTIONAL STATEMENT

Josefina Herrera, the appellant, appeals from the final judgment of the Court of Civil Appelas of Texas dated January 31, 1980. A motion for rehearing was overruled on March 13, 1980. A timely application for a writ of error to the Supreme Court of Texas was "Refused. No Reversible Error," on July 16, 1980. The Court of Civil Appeals holding was that Section 13.01 of the Texas Family Code, a one year statute of limitation for initiating a paternity suit, is constitutional under the Constitution of the United States, and therefore does not deprive an illegitimate child of equal protection and due process guaranteed by the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Court of Civil Appeals, Thirteenth Judicial District of Texas, which appears in the appendix hereto, p.20, infra, is reported at 595 S.W. 2d 189 (Tex. Civ. App. 1980).

A motion for rehearing was overruled on March 13, 1980 without opinion. A copy of the clerk's letter is contained in the appendix hereto, p. 36 infra.

No opinion was rendered by the Supreme Court of Texas in the course of refusing the application for writ of error. A copy of the notice of refusal of the application for writ of error is contained in the appendix, p. 37 infra.

The judgment and findings of fact and conclusions of law of the District Court of San Patricio County, Thirty-sixth Judicial District of Texas, dated April 24, 1979, are not reported. Copies are contained in the appendix hereto, p.21 infra.

JURISDICTION

The refusal of appellant's application for writ of error by the Supreme Court of Texas on July 16, 1980 forever denies appellant the right to sue for paternal child support making the judgment of the Court of Civil Appeals reviewable as a final judgment.

A notice of appeal to this Court was duly filed in the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, and in The Supreme Court of Texas on October 10, 1980 . See p.38&39 infra.

This appeal is being docketed in this Court within 90 days from the refusal of the application for writ of error in the Supreme Court of Texas. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

QUESTION PRESENTED

Whether Section 13.01 of the Texas Family Code violates the Fourteenth Amendment of the Constitution of the United States by creating an illegitimacy classification that denies the appellant, an illegitimate child, the right to sue for paternal child support while imposing no such restriction on legitimate children, similarly situated, and without bearing an evident and substantial relationship to the state interests the statute is designed to serve.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

Texas Family Code § 13.01 (Vernon 1975):

Section 13.01. Time Limitation of Suit.
A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

* * * * *

RAISING THE FEDERAL QUESTION

At the earliest stage possible, the appellent raised the claim, in an objection to a motion for summary judgment, that section 13.01 of the Texas Family Code "violates the Constitutional rights of illegitimate children in that such statutes regates those rights set out in the U.S. Constitution by the 14th Amendment . . ." p. 19 infra. As the Finding of Facts and Conclusions of Law of the District Court indicated the Court states "Texas Family Code Section 13.01 does not deprive the illegitimate child Melinda Herrera, of any rights she is afforded by the United States or Texas Constitution." See p. 25 infra.

The Fourteenth Amendment claim was reinterated by appellant before the Court of Civil Appeals on appeal and in the Petition for rehearing. The Court's opinion states, "Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process." See opinion below, p. 20 infra. It thus considered and expressly rejected this federal constitutional claim.

The refusal by the Supreme Court of Texas of the application for writ of error noting "No Reversible Error" indicated that the Court was of the opinion that the application presented no error which required reversal.

STATEMENT OF THE CASE

Josefina Herrera and the Texas Department of Human Resources filed a suit affecting the parent-child relationship in the interest of Melinda Herrera, a child. Juan Hernandez was named as respondent. The purpose of the suit was to establish the parent-child relationship between Melinda Herrera and Juan Hernandez and to obtain child support for the child.

Suit was filed in the 36th Judicial District Court, Sinton, Texas, on March 6, 1979. On the date of filing Melinda Herrera was almost 3 years old. Juan Hernandez, in due time, filed his written answer and pled the limitation of §13.01, Texas Family Code. Appellee also filed a motion for Summary Judgment on the same day.

The Honorable Ronald Yeager, Judge Presiding, sustained Appellee's plea in bar and entered a take nothing judgment against Appellent. See opinion below p. 21 infra.

THE QUESTION IS SUBSTANTIAL

The question as to whether a one year statute of limitation on paternity actions invidiously discriminates between legitimate and illegitimate children so as to deny illegitimates due process and equal protection under the Fourteenth Amendment is a novel and substantial one. It has never been treated before by this Court.

The classification created by the statue is constitutionally suspect in that it creates separate classes among individuals similarly situated.

The statue implicity recognizes the common law right of legitimates to support from their parents during the entire course of their minority, while limiting that right to parental support for illegitimates by requiring that action be taken within one year after the child's birth to establish paternity. Since a paternity suit is a prerequisite to child support for an illegitimate child, failure of the infant or a next friend to act within the first year of its life results in the permanent denial of the right to sue their natural father for child support. The one year restriction is not imposed for legitimate children nor is there a similar limitation on the right of an illegitimate to sue his natural mother for support.

In Levy v. Louisiana, 391 U.S. 68 (1968), this Court held that a state may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from that right without violating the Equal Protection Clause of the Fourteenth Amendment.

In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), this Court found that illegitimate children must be included equally with other children in sharing in the recovery of workmen's compensation benefits for the death of their parent.

Under these decisions, a State may not invidiously discrimate against illegitimate children by denying them substantial benefits accorded children generally.

Under this statute, the right of an illegitimate child to assert a claim for parental support may be waived by the mother's failure to establish paternity in a timely manner. The forfeiture of such a fundamental right by another is a denial of due process.

Although the expressed governmental interest supporting this statute is the prevention of stale and fraudalent claims it does not bear an evident and substantial relationship to that interest against putative fathers in view of the continued availability of tangible evidence and the failure of the state to provide the same protections for legal fathers as are provided for putative fathers.

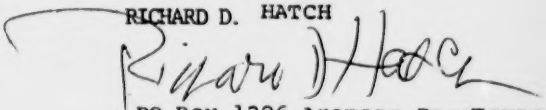
Why should appellant's fundamental right to child support not be protected with the same force of Law as his legitimate counterpart? Why should appellant's fundamental right to child support be forclosed by the action or inaction of another? On any balancing of the State's interest with those of appellant, how can Texas' interest in the prevention of stale or fraudulent claims prevail against the substantial denial of such a fundamental right to an invidiously defined class of persons?

The appellant's claim of permanent denial of a fundamental right by a state statute is substantial. The statue discriminates by invidious classification and is not reasonably related to the interests it is designed to serve.

CONCLUSION

For these reasons, this court should note probably jurisdiction of this appeal.

Respectfully submitted,
RICHARD D. HATCH



12 Sept 80

PO Box 1206, Aransas Pass Texas
78336
AC512 364 1503

APPENDIX

TRANSCRIPT

NO._____

DISTRICT COURT NO. 20610

TEXAS DEPARTMENT OF HUMAN RESOURCES
for JOSEFINA HERRERA — Appellant

VS.

JUAN HERNANDEZ — Appellee

TRANSCRIPT FROM 36th JUDICIAL DISTRICT COURT
OF SAN PATRICIO COUNTY, AT SINTON, TEXAS
THE HONORABLE Ronald M. Yeager, JUDGE PRESIDING

ATTORNEY FOR APPELLANT:

RICHARD D. HATCH
COUNTY ATTORNEY
SAN PATRICIO COUNTY, TEXAS
SINTON, TEXAS 78387

ATTORNEY FOR APPELLEE:

JOHN H. FLINN
P.O. BOX 1112
SINTON, TEXAS 78387

TRANSCRIPT APPLIED FOR BY Richard D. Hatch, County Attorney
ON THE 22nd DAY OF March, A.D. 19 79, AND
DELIVERED TO Richard D. Hatch County attorney ON THE
14 DAY OF May, A.D. 1979.

WINNIE LIGHT
Clerk of The District Court
San Patricio County, Texas
By: Patricia Morton
Deputy

I N D E X

	Volume	Page
1. CAPTION	I	1
2. ORIGINAL PETITION - Filed March 6, 1979	I	2
3. DEFENDANT'S ANSWER - Filed March 12, 1979	I	7
4. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - Filed March 12, 1979 -	I	8
5. PETITIONER'S OBJECTION TO MOTION FOR SUMMARY JUDGMENT - Filed March 22, 1979	I	10
6. ORDER SETTING HEARING ON MOTION FOR SUMMARY JUDGMENT -Signed March 16, 1979	I	11
7. JUDGMENT - Signed March 29, 1979	I	12
8. PETITIONER'S NOTICE OF APPEAL - Filed March 22, 1979	I	14
9. PETITIONER'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW - Filed March 22, 1979	I	15
10. COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW - Filed April 24, 1979	I	16
11. CERTIFIED BILL OF COSTS	I	18
12. CLERK'S CERTIFICATE Dated May 7, 1979	I	19

C A P T I O N

THE STATE OF T E X A S }

COUNTY OF SAN PATRICIO }

BE IT REMEMBERED that at a regular term of the 36th Judicial District Court of San Patricio County, Texas, which began in said County on the 26th day of February, 1979, and which will terminate by operation of law on the 17th day of September, 1979, the Honorable RONALD M. YEAGER presiding as Judge of said Court, the following proceedings were had in Cause No. 20610 Styled:

IN THE INTEREST OF	}	IN THE DISTRICT COURT OF
MELINDA HERRERA,	}	SAN PATRICIO COUNTY, TEXAS
MINOR CHILD	}	36th JUDICIAL DISTRICT

NO. 20610

IN THE INTEREST OF	I	IN THE DISTRICT COURT OF
MELINDA HERRERA,	I	SAN PATRICIO COUNTY, TEXAS
MINOR CHILD	I	36 TH JUDICIAL DISTRICT

ORIGINAL PETITION TO ESTABLISH THE PARENT-CHILD RELATIONSHIP

This suit is brought by the County Attorney of San Patricio County, Texas, for the Texas Department of Human Resources pursuant to the terms of a contract between the Texas Department of Human Resources and San Patricio County, Texas and by Josefina Herrera.

I.

No other Court has continuing jurisdiction of the child who is the subject of this suit.

II.

The following child the subject of this suit, is not the legitimate child of any man, Melinda Herrera, a female child born March 30, 1976.

III.

Support rights for the above-named child have been assigned to the Texas Department of Human Resources pursuant to TEX. REV. STAT. art. 695c, Section 18-B.

VI.

The mother of the child is Josefina Herrera who was born on June 21, 1944 and who resides at 336 N. 11th St., Aransas Pass, Texas 78336.

V.

Petitioners allege that Juan Hernandez whose age is 24 yrs. and who resides at Wilson St., Aransas Pass, Texas 78336. hereinafter called Respondent, is the biological father of the child who is the subject of this suit.

FILED
AT 8:30 A.M. O'CLOCK
MAR 6 1979

XIII.

Respondent is financially able to contribute for the support and maintenance of the minor child in such amounts and at such times this Court may determine to be just and proper.

XIV.

Petitioners request the Court, after appearance of Respondent to order the mother, the father, and the child to submit to blood tests and to prescribe the arrangements for the tests.

Petitioners request that, after completion of the blood tests, the Court Orders all parties to appear in person or by counsel at a pre-trial conference to hear the oral testimony of depositions concerning such blood tests and findings of the Court appointed examiners and if any qualified examiners of blood tests called by any party.

IV.

It was necessary to secure the services of the County Attorney of San Patricio County, a licensed attorney, to preserve and protect the child's rights. Juan Hernandez , Respondent, should be ordered to pay a reasonable attorney's fee, and a judgement should be rendered in favor of the County Attorney's office and against Respondent; or, in the alternative, such reasonable attorney's fee should be taxed as costs and be ordered paid directly to the County Attorney's office, all as is provided for in Section 21.39 of the Family Code.

PRAYER

Petitioners pray that citation be issued to all persons entitled to citation under the law.

Petitioners pray that the Court enter judgment establishing paternity of the alleged father in accordance with the purpose of the suit as above set forth that the mother be apponted managing conservator that any other relief requested be given, and for attorney's

fees, cost and general and specific relief as the Court deems proper.

Petitioners pray further that any payments ordered to be made by the Respondent for the support and maintenance of his minor child be ordered paid, by money order or cashier's check payable to the Texas Department of Human Resources and mailed to the District Clerk, P.O. Box 1084, Sinton, Texas 78387 and said Clerk shall forward such payments to said Department, to the extent that the Department has supplied the needs of said child and for as long as the Department continues to provide support for the said child provided further that in the event that said Department discontinues making assistance payments for the benefits of the named child said Department shall notify the said Registry in writing of such discontinuance and thereafter all such payments received under this Order shall be paid over to: Josefina Herrera.

TEXAS DEPARTMENT OF HUMAN RESOURCES

BY: Richard D. Hatch

Richard D. Hatch, County Attorney
of San Patricio County, Texas
Room 102-Courthouse, Sinton, Texas
Attorney for Petitioner pursuant to
Contract between Texas Department
of Human Resources and San Patricio
County, Texas.

Josie Herrera
Petitioner;

STATE OF TEXAS

COUNTY OF SAN PATRICIO

Josefina Herrera , being duly sworn, deposes and says: That she is a Petitioner herein and that she has read the foregoing petition and knows the contents thereof and that the same is true.

Josie Herrera
Petitioner;

SWORN TO AND SUBSCRIBED before me this the 28th day of February, 1979.

Patsy Martinez
NOTARY PUBLIC IN AND FOR
SAN PATRICIO COUNTY, TEXAS

NAME AND ADDRESS OF
NOTARY PUBLIC

Patsy Martinez

Taft, Texas 78390

My commission expires:

May 10, 1980

14

Process should be served at that address or at the Respondent's regular place of business which is Aransas Coop, Conn Brown Harbor, Aransas Pass, Texas 78336.

VI.

There are no court-ordered conservatorships, guardianships, or other court-ordered relationships affecting the child who is/~~are~~ the subject of this suit.

VII.

No property of value is owned or possessed by the child

VIII.

The purpose of this suit is to establish the parent-child relationship between the father of the child who is the subject of this suit and such child by establishing that the Respondent is the biological father of such child and by obtaining a final court decree to such effect, together with such other and further orders and relief as would follow such determination under the Texas Family Code, all of which are requested.

IX.

The best interest of the child the subject of this suit will be served by appointment of the mother as managing conservator and Petitioners so request.

X.

The mother of the child is without sufficient financial resources to provide support for the minor child

XI.

The Texas Department of Human Resources is currently providing $ 116.00 per month in public assistance payments for the support of the child and has been providing since January 25, 1979.

XII.

Petitioners request the Court to appoint a guardian ad litem to represent the interest of the child the subject of this suit.

NO. 20,610

IN THE INTEREST OF	X	IN THE DISTRICT COURT OF
MELINDA HERRERA,	X	SAN PATRICIO COUNTY, TEXAS
MINOR CHILD	X	36TH JUDICIAL DISTRICT

ANSWER OF JUAN HERNANDEZ

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Juan Hernandez, who was personally served with citation herein, and respectfully files this, his answer to the petition herein, and for such answer would show to the court as follows:

I.

Juan Hernandez avers that Petitioners' alleged cause of action for establishing a parent-child relationship, if Petitioners ever had such a cause of action, is now barred under the provisions of V. T. C. A., Family Code §13.01, in that more than one year has now elapsed between March 30, 1976, the alleged date of birth of said child and the date said cause of action, if any, arose, and March 6, 1979, the date Petitioner filed their petition herein.

II.

For further answer, if further answer be necessary, Juan Hernandez denies generally each and every, all and singular, the allegations contained in the petioners' petition herein, and says that the same are not true, either in whole or in part, and he demands strict proof thereof.

Wherefore, premises considered, Juan Hernandez prays judgement of the Court that Petitioners take nothing by their suit and that he go hence, without day, with his cost.

FILED
AT 4:40 P M. O' CLOCK
MAR 12 1979
WINNIE LIGHT
CLERK DISTRICT COURT
SAN PATRICIO COUNTY, TEXAS
By Patricia Tatom Deputy

John H. Flinn
Attorney at Law
P. O. Box 1112
Sinton, Texas 78387
364-4721

Attorney for Juan Hernandez.

NO. 20,610

IN THE INTEREST OF	I	IN THE DISTRICT COURT OF
MELINDA HERRERA,	I	SAN PATRICIO COUNTY, TEXAS
MINOR CHILD	I	36TH JUDICIAL DISTRICT

MOTION FOR SUMMARY JUDGMENT

Juan Hernandez, served with citation in the above entitled and numbered cause, at a time after he had filed his answer herein, files this his motion for summary judgment under rule 166-A of the Texas Rules of Civil Proceedure, on all issues in this cause as against Petitioners, and for same would respectfully show the Court the following:

I.

There is no genuine issue as to any material fact herein, and Juan Hernandez is entitled to judgement against Petitioners as a matter of law.

II.

Petitioners' suit against Juan Hernandez is predicated upon the provisions of V. T. C. A., Family Code Chapter 13, Subchapter A. and Tex. Rev. Stat. Art. 695c, §18-b.

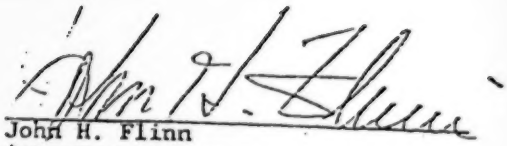
III.

V. T. C. A., Family Code §13.01 provides for a one year statute of limitations for actions brought under Chapter 13, Subchapter A. Such amendment was enacted and became law prior to the date of birth of the minor child who is the subject of this litigation. That the said Juan Hernandez, in his answer herein, properly pleaded the said statute of limitations. That the petition on its face shows that such action is barred by said limitation and Juan Hernandez is entitled as a matter of law to the judgment prayed for in his answer herein.

Juan Hernandez prays that this motion be set for hearing by the Court, that on hearing and consideration thereof said motion be in all things granted, and that summary judgment be entered in favor of Juan Hernandez against Petitioners, for all cost of court, and for such other and further relief to which Juan Hernandez may be entitled.

FILED
AT 11:11 P.M. O' CLOCK
MAR 12 1979
WILMA LIGHT
CLERK DISTRICT COURT
SAN PATRICIO COUNTY, TEXAS

17



John H. Flinn
Attorney at Law
P. O. Box 1112
Sinton, Texas 78387
364-4721

Attorney for Juan Hernandez.

NO. 20,610

IN THE INTEREST OF	IN THE DISTRICT COURT OF
MELINDA HERRERA,	SAN PATRICIO COUNTY, TEXAS
MINOR CHILD	36TH JUDICIAL DISTRICT

OBJECTION TO MOTION FOR SUMMARY JUDGMENT

NOW COMES THE PETITIONER OBJECTING TO RESPONDENTS MOTION FOR SUMMARY JUDGMENT and would show the Court as follows:

I.

The terms of VTCA, Family Code Section 13.01 which provide for a one year bar for the filing of paternity suits violates the Constitutional rights of illegitimate children in that such statute negates those rights set out in the U.S. Constitution by the 14th Amendment and the Texas Constitution by the Bill of Rights Section 3 and 19.

Joel B. Johnson

JOEL B. JOHNSON
Assistant County Attorney
San Patricio County, Texas
Attorney for Petitioner

FILED
AT 4:50 P M. O'CLOCK
MAR 22 1979
CLERK DISTRICT COURTS
SAN PATRICIO COUNTY, TEXAS

NO. 20,610

IN THE INTEREST OF	I	IN THE DISTRICT COURT OF
MELINDA HERRERA,	I	SAN PATRICIO COUNTY, TEXAS
MINOR CHILD	I	36TH JUDICIAL DISTRICT

der Setting Hearing
Motion for Summary
dgment dated March 16,
79

ORDER

On this the 16th day of March, 1979, the motion for summary judgement of Juan Hernandez having been presented to the Court, same is set for hearing on the 22nd day of March, 1979, at 4:00 o'clock P. M. in the District Courtroom of San Patricio County, Texas, at Sinton, Texas.

The clerk is directed to notify the Petitioners of such hearing by delivering a copy of this order and said motion to the attorney of record of Petitioners by United States mail.

Ronald Ney
Judge Presiding.

ERED:

20

NO. 20,610

IN THE INTEREST OF	I	IN THE DISTRICT COURT OF
MELINDA HERRERA,	I	SAN PATRICIO COUNTY, TEXAS
MINOR CHILD	I	36TH JUDICIAL DISTRICT

JUDGMENT

On this 22nd day of March, 1979, came on to be heard the motion for summary judgment of Respondent, Juan Hernandez, in the above numbered and entitled cause, wherein the Texas Department of Human Resources and Josefina Herrera are Petitioners and Juan Hernandez is Respondent. It appears to the Court that such motion has been made in proper form and time, that proper service of Respondent's motion has been made upon the Petitioners and that said Petitioners have been properly notified of the hearing on this motion. Having considered the Respondent's motion and the pleadings on file herein, as well as the argument of counsel, the Court finds that there is no genuine issue of any material fact; that Respondent has properly pleaded the one year statute of limitations contained in V. T. C. A., Family Code §13.01; that such limitations statute was enacted and became effective on September 1, 1975; that the original petition of Petitioners herein shows on its face that the child upon whose behalf such petition was filed was born on March 30, 1976, a date subsequent to the effective date of the limitations statute; that said petition was filed on March 6, 1979, more than two years after the date of birth of said child; that the cause of action, if any, of such child and Petitioners arose on the date of birth of such child; that such cause of action if any, is forever barred by said limitations statute; and that Respondent, Juan Hernandez, is entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that Petitioners, Texas Department of Human Resources, Josefina Herrera and Melinda Herrera, take nothing by this action against Respondent, Juan Hernandez; that all costs of suit herein are adjudged against Petitioners, for which let execution or other appropriate process issue.

Signed this 22nd day of March, 1979.

Judge Presiding.

21

Approved as to form:

Attorney for Petitioners.

Attorney for Respondent.

NO. 20610

IN THE INTEREST OF

MELINDA HERRERA,

MINOR CHILD

IN THE DISTRICT COURT OF

SAN PATRICIO COUNTY, TEXAS

36TH JUDICIAL DISTRICT

itioner's
ice of Appeal
ed
ch 22, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Texas Department of Human Resources by the County Attorney of San Patricio County, Texas, and gives notice that it excepts to the dismissal of this suit on March 22, 1979, and gives notice that it desires to appeal to the Court of Civil Appeals, sitting at Corpus Christi, Texas, from the said dismissal.

Richard D. Hatch
COUNTY ATTORNEY

CERTIFICATE

I hereby certify that a true and correct copy of this instrument has been mailed, through the United States Postal Service, to John H. Flinn, Attorney for Respondent, on this the 23rd day of March, 1979.

Richard D. Hatch
COUNTY ATTORNEY

FILED
AT 4:15 P M. O'CLOCK
MAR 22 1979
CLERK DISTRICT COURT
SAN PATRICIO COUNTY, TEXAS

23

NO. 20610

IN THE INTEREST OF

MELINDA HERRERA,

MINOR CHILD

IN THE DISTRICT COURT OF

SAN PATRICIO COUNTY, TEXAS

36TH JUDICIAL DISTRICT

titioner's Request
r Findings of Facts
d Conclusions of Law
led
rch 22, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Texas Department of Human Resources by the County Attorney of San Patricio County, Texas, and requests the Court to make and file separately, findings of fact and conclusions of law in this case.

Richard D. Hatch
COUNTY ATTORNEY

CERTIFICATE

I hereby certify that a true and correct copy of this instrument has been mailed, through the United States Postal Service, to John H. Flinn, Attorney for Respondent, on this the 23rd day of March, 1979.

Richard D. Hatch
COUNTY ATTORNEY

FILED
AT 4:15 P M. O'CLOCK
MAR 22 1979
CLERK DISTRICT COURTS
SAN PATRICIO COUNTY, TEXAS

24

NO. 10810

IN THE INTEREST OF
MELINDA HERRERA,
MINOR CHILD

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
36TH JUDICIAL DISTRICT

COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

On the 22nd day of March, 1979, a motion for summary judgment was heard and granted in the above numbered and entitled cause, wherein the Texas Department of Human Resources and Josefina Herrera were Petitioners and Juan Hernandez was Respondent.

The Court upon written motion by Petitioners has made the following findings of facts and conclusions of law.

FINDINGS OF FACTS:

1. The child, Melinda Herrera, upon whose behalf a petition was filed, was born on March 30, 1976.

2. The date of birth of the child, Melinda Herrera, is subsequent to the effective date of V.T.C.A. Family Code §13.01.

3. The petition is this cause was filed on March 6, 1979, more than two years after the date of birth of said child.

CONCLUSIONS OF LAW:

1. The Respondent's motion for summary judgment was made in proper form and time.

2. The Respondent's motion was properly served upon Petitioners.

3. The Petitioners were properly notified of the hearing on Respondent's motion for summary judgment.

4. There is no genuine issue of any material fact.

5. The Respondent properly pleaded the one year statute of limitation contained in V.T.C.A. Family Code §13.01

6. V.T.C.A. Family Code §13.01 was enacted and became effective on September 1, 1975.

7. The cause of action to establish parent-child relationship between Melinda Herrera and Juan Hernandez arose on the date of birth of the child, Melinda Herrera.

8. The cause of action to establish a parent-child relationship between Melinda Herrera and Juan Hernandez, is forever barred by V.T.C.A. Family Code §13.01.

FILED
AT 3:25 P.M. O' CLOCK
APR 24 1979
WINNIE LIGON
CLERK DISTRICT COURT

9. V.T.C.A. Family Code §13.01 does not deprive the illegitimate child, Melinda Herrera, of any rights she is afforded by the United States or Texas Constitution.

10. The Respondent, Juan Hernandez, is entitled to judgment on his motion for summary judgment.

SIGNED this the 24th day of APRIL 1979.

JUDGE

BILL OF COSTS

IN THE INTEREST OF MELINDA HERRERA Plaintiff,
MINOR CHILD
No. 20610 vs.
.....Defendant.

IN THE DISTRICT *COURT*
of San Patricio *County.*

M.....

To OFFICERS OF COURT, Dr.

To costs accrued in the above entitled cause to adjournment of the.....Term, 19....., of said Court.

Clerk's Fees	38	00
District Judge's Fees		
Sheriff's Fees	9	00
Law Library	5	00
Total Costs	$ 52	00
By Cash Paid	$ 52	00
Balance Due	----	----

THE STATE OF TEXAS,
County of San Patricio

I, WINNIE LIGHT, Clerk of the Dist. Court in and for said County and State, hereby certify the foregoing to be correct account of the costs adjudged against the Petitioner in the above entitled and numbered suit up to this date.

Witness my hand and the seal of said Court, this the 7 day of May 19 79

WINNIE LIGHT Clerk.
District Court, San Patricio County.
By Patricia Dorton Deputy.

CLERK'S CERTIFICATE

THE STATE OF T E X A S

COUNTY OF SAN PATRICIO

I, WINNIE LIGHT, Clerk of the District Court, in and for San Patricio County, State of Texas, do hereby certify that the above and foregoing are true and correct copies of all the proceedings had in the case of

IN THE INTEREST OF MELINDA HERRERA, MINOR CHILD

VS:

NO. 20610, as the same appear from the originals now on file and of record in this office.

Given under my hand and seal of said Court at office in the City of Sinton, on the 7 day of May, 1979.

WINNIE LIGHT
Clerk of the District Court
San Patricio County, Texas

By: Patricia Norton
Deputy

Court of Civil Appeals

Thirteenth Supreme Judicial District,

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 31s6 day of January, 19 80. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 1546 (Tr. Ct. No. 20610)

TEXAS DEPARTMENT OF HUMAN RESOURCES, Appellant

V.

JUAN HERNANDEZ, Appellee

on appeal to this Court from San Patricio County, Texas

* * * * * * *

J U D G M E N T

On appeal from the 36th District Court of San Patricio County from a judgment rendered March 29, 1979. Opinion by Associate Justice Gerald T. Bissett.

This cause was submitted to the Court on September 6, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby AFFIRMED against appellant Texas Department of Human Resources.

Costs of the appeal are adjudged against Texas Department of Human Resources. It is hereby ordered that they pay all costs of the appeal from which they are not exempt by statute. It is further ordered that this decision be certified below for observance.

* * * * * * * *

Shirley Selz, Clerk

NUMBER 1546

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

* * * * * * *

TEXAS DEPARTMENT OF HUMAN RESOURCES, Appellant,

V.

JUAN HERNANDEZ, Appellee.

* * * * * * *

On appeal from the 36th District Court of San Patricio County, Texas.

* * * * * * *

O P I N I O N

The Texas Department of Human Resources [TDHR] sued Juan Hernandez [defendant] under the provisions of Section 13.01 et seq of the Texas Family Code to establish a parent-child relationship between defendant and an illegitimate child whose mother had assigned support rights to TDHR. 1/ Defendant filed a motion for summary judgment asserting that the suit was barred by the statute of limitations set forth in Section 13.01 of the Texas Family Code, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural father must be brought within one year from the birth of the child. 2/ The trial court granted the motion for summary judgment, it being undisputed that, while the child was born March 30, 1976, suit was not filed until March 6, 1979. We affirm.

1/ This suit is distinguishable from a bastardy, or filiation, suit. While the successful prosecution of a suit to establish the parent-child relationship pursuant to Section 13.01 et seq of the Family Code would entail legitimation of the child, TEX.FAMILY CODE ANN. §§12.02(c), 13.09 (1975) (Supp. 1980), filiation would not necessarily import legitimacy. See Rodrigues v. Rodrigues, 190 N.E. 20 (Mass. 1934); Waddell v. State, 357 S.W.2d 651 (Ark. 1962).

2/ Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred." TEX.FAMILY CODE ANN. §13.01 (Supp. 1980).

Disposition of this cause requires us briefly to review the history of paternity suits, and support rights of illegitimate children in the State of Texas. Prior to January 17, 1973, the law in Texas imposed duties on fathers to support legitimate children but denied that right to illegitimates. Compare Gully v. Gully, 231 S.W.97 (Tex.Sup. 1921) with Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex.Sup. 1966). This law was invalidated upon constitutional grounds by the United States Supreme Court on January 17, 1973, in Gomez v. Perez, 409 U. S. 535, 93 S. Ct. 872, 35 L.E.C. 2d 56 (1973). In Gomez the court concluded that Texas law violated the constitutional guarantee of equal protection, stating:

> "Once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." (409 U. S. at 538)

Implicit in the Gomez decision was the notion that an illegitimate has a common law right to institute a proceeding for the purpose of showing that the alleged father is the biological father as a necessary requisite to establish a judicially enforceable right otherwise accorded to legitimate children generally. Wynn v. Wynn, 587 S.W.2d 790 (Tex.Civ.App.--Corpus Christi 1979, no writ).

After Gomez the legislature enacted Title 2 of the Family Code governing the parent-child relationship. Tex. Laws 1973, ch. 543 at 1411. Understandably, in drafting Title 2, the legislature considered comprehensive provisions regulating the legal aspects of children born out of wedlock. Despite the Gomez decision, however, such comprehensive provisions were not passed. Instead, the legislative "response" to Gomez was found in Chapter 13 of the Family Code which provided for voluntary legitimation proceedings. Smith, Commentary on Title 2 of the Family Code, 5 Tex. Tech. L. Rev. 389, 418 (1974). It was later held, however, that when the legislature provided judicial relief against the father on behalf of a legitimate child for support, due to Gomez it necessarily provided the same relief on behalf

of an illegitimate child. In the Interest of R__ V__ M__, 530 S.W.2d 921 (Tex.Civ.App.--Waco 1975, no writ). Thus, after the effective date of Title 2, which was January 1, 1974, illegitmate children had judicially enforceable support rights, whether by common law or by statute, against their biological fathers. Gomez, supra; Wynn, supra; In the Interest of R__ V__ M__, supra.

Remaining in a state of flux, the statutory rights of illegitimates were brought into sharper focus by amendments to Chapter 13 of Title 2 of the Family Code, the effective date of which was September 1, 1975. The result was the present involuntary legitimation proceeding found in Sections 13.01 through 13.09 of the Family Code. By enacting Section 13.01 et seq of the Family Code, the legislature attempted to provide a practical framework within which the rights of the alleged father as well as the rights of the illegitimate child are protected. Wynn v. Wynn, supra. The United States Supreme Court said in Gomez that there are

> ". . . lurking problems with respect to proof of paternity. Those problems are not to be brushed lightly aside, but neither can they be made into an impenatrable barrier that works to shield otherwise invidious discrimination."

Section 13.01 of the Family Code, which requires that paternity suits be filed at least one year from the birth of the child, first came under judicial scrutiny with regard to the issue of retroactivity. In Alvarado v. Gonzales, 552 S.W.2d 539 (Tex.Civ.App.--Corpus Christi 1977, no writ), this Court held that Section 13.01 was intended to apply only to those suits to establish the parent-child relationship for illegitimate children born after September 1, 1975, the effective date of the statute. We also held that retroactive application of the limitation statute would violate the constitutional rights of illegitimate children born before the statute took effect.

In Alvarado we were not called upon to determine the constitutionality of Section 13.01 as it applies to children born after the effective date of the statute. This issue did not come before an appellate court until Texas Department of Human Resources v. Chapman, 570 S.W.2d 46 (Tex.Civ.App.--Dallas 1978, writ ref'd n.r.e.). In Chapman the Court held that the statute of limitations for initiating a paternity suit did not

deprive an illegitimate child of his constitutional rights to due process and equal protection under either the United States Constitution or the Texas Constitution. In reaching its holding, however, the court expressly reserved judgment on whether the various tolling provisions set forth in the Texas Revised Civil Statutes are applicable to extend the period within which a paternity suit may be filed. 570 S.W.2d at 49, n. 3.

The issue of tolling was both considered and decided shortly after Chapman in Texas Department of Human Resources v. Delley, 581 S.W.2d 519 (Tex.Civ.App.--Dallas 1979, writ ref'd n.r.e.). In Delley the Court was faced with a suit brought on behalf of a child born before the effective date of Section 13.01. Finding itself in agreement with this Court's decision in Alvarado, the Court held that Section 13.01 only applies to children born after September 1, 1975. The Court next held that the proper statute of limitations for suits brought on behalf of children born before the effective date of Section 13.01 is the four-year statute of limitations provided in TEX.REV.CIV.STAT.ANN. art. 5529 (1958). Finally, the Delley court held that the four-year statute of limitations is tolled during the minority of the child as a matter of public policy and by virtue of TEX. REV.CIV.STAT.ANN. art. 5535 (Supp. 1978-79), the general tolling statute.

TDHR's points of error on appeal in the case at bar. Present to this Court the issues of whether Section 13.01 is constitutional and, if so, whether it is tolled during the minority of a child born after the effective date of the law. Regarding the constitutionality of Section 13.01, we, as an intermediate appellate court, choose to follow Chapman, since a writ or error was refused "no reversible error" by the Texas Supreme Court. TDHR's constitutional arguments in the case at bar are virtually the same as its arguments made in Chapman. Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process.

We next turn to the argument of TDHR that Section 13.01 should be tolled uring the minority of the child. The action at bar was brought by TDHR, pursuant to an assignment to it by

the child's mother of her rights to child support. This assignment was made pursuant to TEX.REV.CIV.STAT.ANN. art. 695c §18-B(c) (Supp. 1979). Nevertheless, it is a "suit affecting the parent-child relationship" because the suit was brought under the Family Code to legitimate the child in order to require support by the biological father. TEX.FAMILY CODE ANN. §11.01(5) (1975). It may be brought by "any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the State. . . and any authorized agency." TEX.FAMILY CODE ANN. §11.03 (1975). Since, however, the essential concern in any case is the best interest of the child, TEX. FAMILY CODE ANN. §14.07(a) (1975), we may assume that, although the action at bar was brought by TDHR, the real party in interest is the child. See Texas Dept. of Human Resouces v. Delley, supra.

Although the child is the real party in interest in this action, however, it would be both illogical and unreasonable for this Court to hold that Section 13.01 is tolled on account of minority. The purpose of this lawsuit is to establish the duty of the biological father to support a child fathered by him and born out of wedlock. Tolling the statute of limitations would simply allow the child to bring suit for child support once he is no longer a child. Furthermore, tolling the statute of limitations would but constitute a disingenuous way of holding Section 13.01 unconstitutional, a conclusion we are not willing to reach in light of the Supreme Court's decision to refuse a writ of error in Chapman for want of reversible error. Moreover, we note that Section 13.01 is an integral part of the same statutory scheme which created the involuntary legitimation proceeding. Where a statute creates a right and also incorporates a limitation upon the time within which the suit is to be brought, the limitation qualifies the right so that it becomes a part of the substantive law rather than the procedural law. Franco v. Allstate Ins. Co., 505 S.W.2d 789 (Tex.Sup. 1974); Francis v. Herrin Trans. Co., 432 S.W.2d 710 (Tex.Sup. 1968); State of California v. Copus, 309 S.W.2d 227 (Tex.Sup. 1958). Thus, it would be highly improper for this Court to toll, and in effect, emasculate, what is obviously a substantive part of Chapter 13 of the Family Code. TDHR's last point of error, therefore, is overruled.

There is a vast difference between the duties imposed upon a biological father of an illegitimate child and the rights acquired by the child in a successful suit for legitimation, and those duties imposed and rights acquired in a suit for child support only. The points of error before us in this appeal relate solely to Chapter 13 of the Family Code, although, arguendo, the child may have a common law right for support because, when the legislature provided a judicial right against the biological father on behalf of a legitimate child for support [TEX.FAMILY CODE ANN. §§ 4.02, 12.04 and 14.05 (1975 and 1980 Supp.], it necessarily provided the same relief on behalf of an illegitimate child. See Wynn v. Wynn, supra; In the Interest of R__ V__ M__, supra. The only difference is that the illegitimate child must first prove biological fatherhood.

We cannot decide this case on legal theories which are not asserted by the appellant, are not based upon proper pleadings and are not before this Court on proper points of error. Therefore, insofar as this appeal is concerned, it is immaterial whether a common law cause of action for child support which stops short of actual legitimation exists on behalf of an illegitimate child. That issue was not before the trial court, is not before us, and we express no opinion thereon.

The judgment of the trial court is AFFIRMED.

GERALD T. BISSETT
Associate Justice

Opinion delivered and
filed this, the 31st
day of January, 1980.

PAUL W. NYE
CHIEF JUSTICE
GERALD T. BISSETT
ASSOCIATE JUSTICE
HORACE S. YOUNG
ASSOCIATE JUSTICE

Court of Civil Appeals

Thirteenth Supreme Judicial District

SHIRLEY SELZ
CLERK
RUTH G. GIBSON
DEPUTY CLERK
512 888-0416

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

March 13, 1980

Mr. Richard D. Hatch
County Attorney
Courthouse
Sinton, Texas

Mr. John H. Flinn
Attorney at Law
P.O. Box 1112
Sinton, Texas 78387

Re: Cause No. 1546
Texas Department of Human Resources
v.
Juan Hernandez

Gentlemen:

Appellant's motion for rehearing was today overruled by this Court.

Very truly yours,

Shirley Selz, Clerk

SS:pw

CLERK'S OFFICE - SUPREME COURT

Austin, Texas July 16, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of TEXAS DEPARTMENT OF HUMAN RESOURCES ET AL. v. HERNANDEZ, No. B-9338

was this day refused. No reversible error.

Very truly yours,
CARSON R. JACKSON, Clerk

IN THE COURT OF CIVIL APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT

STATE OF TEXAS

Josefina Herrera, Appellant

v. No.

Juan Hernandez, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Josefina Herrera, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals of the State of Texas entered January 31, 1980, affirming the summary judgement of the trial court rendered March 29, 1979. A timely petition for Writ of Error to the Supreme Court of the State of Texas was "Refused. No Reversible Error," on July 16, 1980. This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Richard D. Hatch
Counsel for Appellant

PO Box 1206, Aransas Pass Texas 78336
AC512 364 1503

IN THE SUPREME COURT OF THE

STATE OF TEXAS

Josefina Herrera, Appellant

v. No.

Juan Hernandez, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Josefina Herrera, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals of the State of Texas entered January 31, 1980, affirming the summary judgment of the trial court rendered March 29, 1979. A timely petition for Writ of Error to the Supreme Court of the State of Texas was "Refused. No Reversible Error," on July 16, 1980. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Richard D. Hatch

Richard D. Hatch
Counsel for Appellant

PO Box 1206, Aransas Pass Texas
78336
AC512 364 1503

RECEIVED
OCT 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5565

ROBERT WAYNE WILLIAMS,

PETITIONER,

VS.

THE STATE OF LOUISIANA,

RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, ROBERT WAYNE WILLIAMS, who is now confined in Louisiana State Penitentiary at Angola, Louisiana, asks leave of this Court to file the attached Petition For Writ of Certiorari to the Supreme Court of Louisiana without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Undersigned counsel is in the process of obtaining an affadavit from the petitioner in support of this motion, which affadavit will be transmitted to this Court wihtin the next ten (10) days. In lieu of this affadavit at the present time, the undersigned counsel has attached her own affadavit, hich attests to the petitioner's indigency on appeal in the Supreme Court of Louisiana.

WHEREFORE, petitoner, ROBERT WAYNE WILLIAMS, request that he be granted leave to proceed in forma pauperis in this Court

DATE: OCTOBER 15, 1980.

RESPECTFULLY SUBMITTED,

BELHIA V. MARTIN
344 Camp St Suite 708
New Orleans, LA. 70130
(504) 581-3647

RECEIVED
OCT 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5565

ROBERT WAYNE WILLIAMS,

PETITIONER,

VERSUS

THE STATE OF LOUISIANA,

RESPONDENT.

AFFIDAVIT OF BELHIA V. MARTIN IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, BELHIA V. MARTIN, do hereby swear under penalty of prejury:

1. I am a member of the Bar of the State of Louisiana and am representing petitioner, ROBERT WAYNE WILLIAMS, in the above-captioned case;

2. I am presently residing in New Orleans, Louisiana, and have not yet been able to secure an affidavit of indigency from the petitioner, who is incarcerated at the Louisiana State Penitentiary in Angola, Louisiana, which is a considerable distance from New Orleans. However, I do plan to secure such an affidavit from the petitioner in the near future;

3. Mr. Williams was represented on appeal to the Supreme Court of Louisiana by Mr. Marion Weimer and Mr. Stephen Covell, who were originally appointed to the case by the trial court.

4. I will transmit petitioner's affadavit of indigency to the Court within the next ten (10) days.

I declare under the penalty of perjury that the foregoing is true and correct.